Supreme Court, U. S.
FILED
JUL 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1402

HUGH C. WILBOURN,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

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The petitioner, HUGH C. WILBOURN, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Louisiana entered in this proceeding on November 13, 1978.

STATUS OF THE CASE

On March 13, 1979, HUGH C. WILBOURN, petitioner herein, filed a petition with this Honorable

Court for a Writ of Certiorari to the Supreme Court for the State of Louisiana. After reviewing this petition, this Court requested and received a Brief in Opposition to said Writ from the State of Louisiana. Petitioner now respectfully submits this Reply Brief. Petitioner re-urges and re-emphasizes all four of its original reasons for granting of said Writ, believing all of them to be meritorious. This Reply Brief specifically addresses itself to petitioner's first reasons for granting the Writ, i.e., the search conducted herein violated the Fourth Amendment of the United States Constitution, because petitioner believes that respondent's argument on this issue is particularly in error both factually and legally.

I.

The search conducted herein violated the Fourth Amendment of the United States Constitution.

On Monday, September 22, 1975, at about 4:15 P.M., St. Bernard Parish Deputies, B. Emmons and L. Gagliano were on routine vehicular patrol when they received a radio dispatcher to proceed to 513 Norton Avenue, Arabi, Louisiana, and check for a brown late model Ford suspected of being involved in a hit-and-run. The source of this information was an anonymous telephone call received by the radio dispatcher.

At approximately 4:30 P.M., Deputies Emmons and Gagliano arrived by vehicle and stopped at the premises located at 513 Norton Avenue. Upon arriving, the

officers observed a two-tone (white top, brown bottom) 1974 Ford parked under the carport. The right rear tire of the vehicle in the carport was flat, and its right rear bumper appeared to be damaged. The car was parked with its rear facing Norton Avenue (See defense Exhibits D-3 and D-4). The car and carport appeared to be empty.

The officers then entered the carport in order to obtain view of the front of the vehicle in an effort to determine if the vehicle had in fact been involved in a hit-and-run. Once in the carport, the officers walked to the front of the vehicle and observed what appeared to be blood stains and damage on the front of the car. The front of the vehicle could not be seen from either the street or sidewalk.

Thereafter, the vehicle was impounded, without a search warrant, determined to be owned by defendant, HUGH C. WILBOURN. It was also determined that the defendant resided at 513 Norton Avenue.

Prior to entering the premises of 513 Norton Avenue, the police had neither an arrest warrant nor a search warrant. (MTS tr. pp. 12, 13 and 27). Evidence taken from the exterior of the car, and submitted to scientific analysis, was used at the trial of petitioner herein and was relied upon exclusively in order to prove his guilt.

Petitioner herein has argued in his original petition for a Writ of Certiorari that the evidence obtained from

his automobile was seized in violation of the Fourth Amendment of the United States Constitution. Respondent has presented two arguments opposing this petition. First, respondent argues that *prior* to the officers' intrusion into the carport, the officers had no probable cause to believe that petitioner's automobile was involved in the hit-and-run accident. Second, respondent argues alternatively that the officers, even without probable cause to search the carport and/or car, were legally authorized to enter the carport. Petitioner respectfully posits that these arguments are in error both factually and legally.

Prior to the officers' intrusion into the carport, the officers had no reason to believe that petitioner's automobile was involved in the hit-and-run accident. The uncontradicted testimony of the investigating officers given at the Motion to Suppress the Evidence held on December 15, 1976, proves that the officers did not have any reason, prior to the intrusion onto petitioner's property, to believe that the petitioner's automobile was the sought-for-automobile. This Court's attention is particularly drawn to the following testimony from the investigating officers:

OFFICER BARKLEY EMMONS:

"We didn't have any reason to believe that it was the car til we saw the front of the car."

Q "You didn't know that this car was the identified vehicle that you received from your dispatcher?"

A "No, sir." (See Motion to Suppress, Dec. 15, 1976, p. 8 — hereinafter referred to as MTS) . . .

Q "Could you tell from the street that this car was the vehicle in the alleged hit-and-run accident?"

A "No, sir." (MTS, p. 9)

"We didn't think it was the car til we checked the front of it." (MTS, p. 13)

Officer Gagliano, when asked by counsel, "Did you think that was the car when you first arrived at the street?" replied "Not when you looked at it from the street." (MTS, p. 28)

Significantly, the description given by the police dispatcher of the sought-for-automobile was a brown Ford (MTS, pp. 5, 24). Petitioner's car is a two-tone Ford (white top, brown bottom).

Petitioner thus submits, and the uncontradicted testimony cited above along with the entire transcript of the Motion to Suppress proves that the investigating officers had no reason, prior to entering on petitioner's property and conducting a search of his carport, to believe that petitioner's automobile was the hit-and-run automobile.

The respondent, given the above facts, alternatively argued that the police had legal authority to enter petitioner's carport. Petitioner respectfully argues that

police officers, with no reason to suspect wrongdoing, may not enter onto private property to engage in "fishing expeditions."

Moreover, petitioner argues that the evidence was seized illegally as the police did not just enter the carport, but, in their own words, "searched the premises." (MTS, p. 31).

The carport, as shown in Defense Exhibit D-3 and D-4, is recessed such that the front boundary of the carport is farther from the street than is the front of the house. Moreover, the carport is fully connected to the house on one side and enclosed by a cement fence on the other. The car itself was parked such that its front bumpers were as close to the back wall of the carport as possible thus positioning the vehicle completely within the confines of the carport.

The carport was used only by the residents of 513 Norton Avenue and was not part of an apartment complex. Furthermore, the carport *was not* used as a passage way to enter the house. There is a door on the back wall of the carport, but this door only leads into a utility shed and not the house. (The Louisiana State Supreme Court erroneously held as a matter of fact that this door was located at the side of the carport and led into the house.)

The investigating officers in this case, not only entered the carport, but, in their own words, "searched

the premises." (MTS, p. 31) Clearly, if a person entered any part of the carport without permission, and searched the area rear of the carport possible charges of attempted burglary, criminal mischief, etc., would lie. In fact, the Louisiana Supreme Court affirmed a burglary conviction in which the facts were similar to the present case. In *State v. Baggett*, 292 So.2d 201 (La. 1974) an outboard motor had been removed from the rear of a boat backed into the victim's carport. The defendants in *Baggett* argued that the carport is not a "structure" and that walking into a carport open to the street is not an "unauthorized entry" prohibited by La. R.S. 14:62, relative to burglary. The Louisiana Supreme Court held that entering into the carport, included within the frame and roof of the house and fenced to prevent entry was "unauthorized" since it was not open to the public with consequent implied consent. See *State v. Baggett*, 292 So.2d at 203 (La. 1974).

Respondents rely upon the case of *Cardwell v. Lewis*, 94 S.Ct. 2464 (1974) as authority for the officers' search herein of the car and carport. *Cardwell*, however, is easily distinguishable and, if anything, supports petitioner's Writ. In *Cardwell*, law enforcement officers had arrested the defendant prior to the seizure of his car. This Court correctly held that "where *probable cause exists* (emphasis added), a warrantless examination of the exterior of a car is not unreasonable under the Fourth and Fourteenth Amendment." *Cardwell, supra*, 417 U.S. at 592. In the case at bar, the officers had no probable cause to approach the automobile. Further, the auto-

mobile in *Cardwell* was parked in a public parking lot. In contrast, the petitioner's automobile was parked in a private carport.

The distinction in the two cases is readily apparent if the knowledge of the two sets of officers is viewed in terms of warrant requirements. If the *Cardwell* investigating officers had proceeded to a magistrate to obtain a search warrant, they could have stated: (1) the car is in a public parking place; (2) the owner is under arrest; (3) the car is the same color as the murder car; (4) there has been repair work performed on the car; and (5) there is a personal connexity between the victim and defendant. See *Cardwell v. Lewis*, 417 U.S. at 587. In stark contrast, the investigating officers in the present case, if they had proceeded to a magistrate to obtain a search warrant prior to intruding into the carport, would have stated: (1) the car is on private property; (2) the owner has not given consent to proceed unto his private property; (3) the owner of this car is unknown; (4) the car color does not match the described color of the hit-and-run vehicle; (5) there is no indication of any repair work performed on the car; (6) there is no evidence of a personal connexity between the victims and the defendant; and (7) the officers have no reason to believe that the petitioner's car is involved in the hit-and-run accident.

Surely, while a magistrate would be correct in signing a search warrant in the *Cardwell* situation, he would be incorrect in the present situation given the above facts.

This Court has warned of the evils of "general, explanatory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) at 467. It is clear in the present case, that the investigating officers did not have probable cause to approach the car nor were they engaged in legal search. Rather, the officers were engaged in a general, fishing expedition, "rummaging" in the petitioner's belongings. There has been general agreement that "except in certain carefully defined classes of cases, a search of private property without prior consent is "unreasonable" unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, 528-529 (1967).

Surely, given the investigating officers' testimony no search warrant would have been issued by a magistrate. The search was illegal and the evidence obtained, it is submitted, should be suppressed.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Louisiana Supreme Court in *State v. Wilbourn*, reported in proceedings No. 62,005 of the Supreme Court of Louisiana.

Respectfully submitted,

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BRUCE C. ASHLEY, II

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been served on Hon. Harry Connick, District Attorney and Dennis Waldron, Criminal Courts Building, 2700 Tulane Avenue, New Orleans, Louisiana, 70119, by U.S. Mail, postage prepaid, this ____ day of July, 1979.

BRUCE C. ASHLEY, II